Nos. 78-575, 78-597 and 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS

v.

SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 303-316) is reported at 570 F.2d 1349. The opinion of the Inter-

state Commerce Commission (A. 280-290) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 303-316) was entered on February 16, 1978. A petition for rehearing was denied on May 12, 1978 (A. 317-318). The petitions for a writ of certiorari were filed on October 6, 1978 (No. 78-575) and October 10, 1978 (Nos. 78-597 and 78-604), within the time as extended, and invoked this Court's jurisdiction under 28 U.S.C. 1254(1) and 2350(a). This Court granted the petitions on January 8, 1979, and consolidated the cases (A. 319-321).

QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission refusing to investigate a proposed rate increase.

STATUTES INVOLVED

Sections 13(1) and 15(8) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(1) and 15(8), and Sections 10, 10(a) and 10(c) of the Administrative Procedure Act, now 5 U.S.C. 701, 702, and 704, are set forth in pertinent part in Appendix A, *infra*, 1a-5a.

STATEMENT

1. Under the Interstate Commerce Act, carriers have the initiative in railroad ratemaking, subject to advance notice requirements and to the Commission's powers to suspend and investigate proposed rate changes. See *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973) (*SCRAP I*). A carrier desiring to increase its rates must file a tariff reflecting the changes under Section 6(3), 49 U.S.C. (1976 ed.) 6(3),[1] at least 30 days before the changes are to go into effect. In the absence of any action by the Commission, the rates become effective.

When a tariff is filed, Section 15(8) of the Act, 49 U.S.C. (1976 ed.) 15(8), provides in subsection (a) that "the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness" of the rates proposed in the tariff. That section also requires the Commission to render a final decision in any such hearing within seven (or on certain conditions ten) months. Section 15(8)(f) provides that in any such hearing "the burden of proof is on the common carrier by railroad to show that the proposed changed rate * * * is just and reasonable * * *." Section

[1] On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. For purposes of clarity, we refer to the statutes by their former designations. Appendix B, *infra*, sets forth a table of the recodified sections of the sections of the Act referred to in this brief.

15(8)(b) of the Act authorizes the Commission to suspend the effectiveness of a proposed rate change for the seven or ten-month period in which an investigation is held under Section 15(8)(a).[2]

If a new tariff goes into effect because the Commission has decided not to suspend it and not to conduct an investigation into its lawfulness under Section 15(8)(a), any person, such as a shipper, may complain to the Commission under Section 13(1), 49 U.S.C. (1976 ed.) 13(1), that the rates are unlawful; in that event "it shall be the duty of the Commission to investigate the matters complained of * * *." In such an investigation, the complainant has the burden of demonstrating that the rates are unlawful. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 812-814 (1973).

If the Commission conducts an investigation under either Section 15(8)(a) or Section 13(1) and renders a final decision that the rates are lawful or unlawful, that decision is subject to judicial review. 28 U.S.C. 2342(5). This Court has held, however, that a decision by the Commission not to suspend a rate is not subject to judicial review, because Congress intended

[2] Prior to 1976 the provision of the Act authorizing the Commission temporarily to suspend the proposed rates of rail carriers (49 U.S.C. (1970 ed.) 15(7)) placed no limitations on that authority. The Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, enacted a new suspension provision pertaining exclusively to rail carriers (the present 49 U.S.C. (1976 ed.) 15(8)), and that provision places significant limitations on the Commission's authority to suspend. See 49 U.S.C. (1976 ed.) 15(8)(b), (c) and (d).

that only the Commission have authority to suspend the effectiveness of rates pending a final decision on their lawfulness. *SCRAP I*, *supra*, 412 U.S. at 691; *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

2. In August 1977 the principal southern railroads filed a tariff proposing a 20% seasonal increase in rates for the shipment of certain grains between Illinois and Indiana and points in the southeastern United States. The tariff was to be effective from September 15 to December 15, 1977. Some 35 parties, including shippers, associations, state departments of agriculture and the United States Department of Agriculture asked the Commission to suspend and investigate the rate. Protestants alleged that the proposed tariffs were unreasonable and discriminatory, in violation of Sections 1(5), 2, 3(1) and 4(1) of the Act, 49 U.S.C. (1976 ed.) 1(5), 2, 3(1) and 4(1) (A. 304-305).

The Commission denied the petitions for suspension and investigation of the rates (A. 286-290). The Commission stated that the evidence did not warrant suspension of the tariff, but it "admonished" the railroads to "take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any" (A. 288).[3] The Commission declined

[3] Section 4(1) essentially prohibits a railroad from collecting a greater total charge for shipments over shorter distances than over longer distances when both involve the same route and direction. The prohibition is absolute, with relief available only by express findings, after investigation, that a "special case" exists. See *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914).

to exercise its authority to investigate the rates under Section 15(8)(a), holding that the proposal "appears to be in general conformity" with the goals of the 4-R Act and that the protestants had not "sustained their burden on the section 1(5) assertions" (A. 288). It stated that the allegations of violations of Section 2 and Section 3(1) appeared to stem from "the possibly overbroad scope of the proposal" but held that there was insufficient evidence to warrant suspension (A. 289). The Commission referred to a "clear Congressional purpose to permit experimental ratemaking" and observed that "[t]he complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected" (A. 289).

3. The court of appeals vacated the Commission's order and remanded the case for further proceedings (A. 303-316). The court concluded that, under the "peculiar circumstances of this case," the Commission erred by failing to open a formal investigation (A. 315-316). The court rejected the Commission's contention that *Arrow Transportation Co.* v. *Southern Ry.*, *supra*, precluded review, because the court concluded that "[t]he factors which prompted the Supreme Court in *Arrow Transportation Co.* v. *Southern Railway Co.*, *supra*, to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff" (A. 310). With respect to such decisions, the court held, the regulatory scheme did not preclude review "under all circumstances" (A. 314). The court concluded

that where allegations of substantial statutory violations have "sufficient substance" (A. 315), immediate review of a decision not to investigate is appropriate because such a decision "is equivalent to a finding of lawfulness of the tariffs" and because review would promote administrative efficiency by "eliminat[ing] the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court" (A. 314).

INTRODUCTION AND SUMMARY OF ARGUMENT

We do not agree with the position of either petitioners or the court of appeals. Our view is that the decision of the Commission not to conduct an investigation under Section 15(8)(a) is subject to judicial review to determine whether it was arbitrary, capricious, or an abuse of discretion. But that decision is not, as the court of appeals held, reviewable immediately after the Commission declines to open an investigation; it is reviewable only after the Commission has entered a final order on the lawfulness of the rate following an investigation and adjudication that any aggrieved person can require the Commission to conduct under Section 13(1) of the Act.

Our submission is based on the fact that a decision not to conduct an investigation under Section 15(8)(a) is functionally equivalent to a decision to allocate the burden of proof in an investigation to shippers or other persons aggrieved by rate increases. Nothing in the Act or its purposes suggests a congressional intent entirely to insulate such a burden-allocation

determination from judicial review. But the regulatory purposes of the Act and general principles of finality establish that it is necessary to protect the carefully structured ratemaking procedures of the Act from the delay that would result from immediate judicial review of an essentially interlocutory burden-allocation decision. Review of that determination—which is only one of many potentially important issues—should await the completion of the investigation that any aggrieved person can require the Commission to conduct under Section 13(1). If the Commission errs in allocating the burden, and if that error has decisional consequence, judicial review of an order entered at the end of a Section 13(1) proceeding would adequately protect any party aggrieved by the error without disrupting the Commission's administrative functions.

In practical effect, our position may not differ significantly from the position of the Commission and the other petitioners. We agree with the Commission that it has wide discretion in determining whether to initiate an investigation under Section 15(8)(a). Moreover, because the Commission's failure to initiate a Section 15(8)(a) investigation would be arbitrary, capricious or an abuse of discretion only when the complainants had built a powerful case that the rate was unlawful, it seems unlikely that the complainants would in such cases fail to satisfy any burden placed on them by the Commission, properly or not, in a Section 13(1) proceeding. Nevertheless, we believe that the principle we assert is important and, as decisions of this Court indicate, there may well be cases in which the Commission's decision to allocate the burden of proof would be error that changes the outcome of the case.

ARGUMENT

A. The Commission's Decision Not To Open An Investigation Under Section 15(8)(a) Is Immune From Judicial Review Only If A Statute Expressly Precludes Review Or If The Statutory Structure Indicates That Review Is Inappropriate

The Administrative Procedure Act establishes a strong presumption in favor of judicial review of agency action. 5 U.S.C. 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Act provides an exception to that principle only to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). As this Court had concluded, judicial review is available unless a statute expressly precludes review or "unless there is persuasive reason to believe" that Congress intended to preclude review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); see also *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977) (collecting cases).

B. A Decision Not To Conduct An Investigation Under Section 15(8)(a) May Be Judicially Reviewed, But Only After A Final Commission Decision On The Lawfulness Of The Rates

1. A Decision Not to Investigate Under Section 15(8)(a) Is Essentially A Decision Allocating Burdens of Proof, And Judicial Review of Such Decisions is Consistent with the Statutory Plan

No statute expressly prohibits judicial review of a decision not to initiate an investigation under Section 15(8)(a). Moreover, nothing in the structure of the Interstate Commerce Act suggests that judicial review would interfere with the achievement of the legislature's objectives. On the contrary, judicial review of such decisions, at the appropriate time, is consistent with the purposes and structure of the Act. That is so because, under the particular and somewhat unusual structure of the Interstate Commerce Act, the Commission's decision not to investigate rate changes under Section 15(8)(a) does not amount to a decision not to adjudicate the lawfulness of the rates at all; instead it amounts to a decision to place the burden of proof on shippers in an investigation and adjudication that protesting shippers can compel the Commission to conduct under Section 13(1).

As we have pointed out (pages 3-5, *supra*), if the Commission initiates an investigation under Section 15(8)(a), the statute places the burden of proof on carriers to demonstrate that the proposed rates are lawful. If the Commission declines to initiate such a proceeding and the rates go into effect, shippers and other aggrieved persons have a statutory remedy:

they can file a complaint under Section 13(1) and require the Commission to investigate and adjudicate the lawfulness of the rates. Section 13(1) gives no discretion to the Commission to decline to conduct an investigation; it provides that if a complaint is filed, and if the carrier does not "satisfy the complaint" within a reasonable time, or if "there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."[4] If, after an investigation under Section 13(1), the Commission determines that the rates charged were unlawful, the shippers may obtain damages resulting from the unlawful rates. 49 U.S.C. (1976 ed.) 8, 9. If the Commission determines that the rates are lawful, the shipper may obtain judicial review. 28 U.S.C. 2342(5). In a Section 13(1) proceeding, however, the shipper has the burden of showing that the rate is unlawful: "the shipper must produce substantial evidence that the rate is unreasonable." *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 814 (1973) (plurality opinion); see also *id.* at 812-813.

In light of these provisions, the principal effect on interested parties of a decision by the Commission not

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[4] If the Commission conducts such an investigation, Section 14(1) of the Act, 49 U.S.C. 14(1), requires it to render a decision on the merits and to state its reasons in writing. See *City of Chicago* v. *United States*, 396 U.S. 162, 166 (1969).

to initiate an investigation under Section 15(8)(a) is to place the burden of proof on shippers. Such a decision does not, contrary to the court of appeals' view (A. 314), constitute a determination that the rates are lawful, and it does not preclude the shipper from demonstrating or the Commission from deciding in a Section 13(1) proceeding that the rates are unlawful. It is no more a final decision on the merits than, for example, a district judge's denial of a request for summary judgment. Trial lies ahead.

Such a decision also does not delay the shippers' remedies, for they can file a Section 13(1) complaint and require the Commission to initiate an investigation as soon as the rates go into effect. In this case they could have compelled a Section 13(1) investigation the day after the Commission declined to institute an investigation under Section 15(8)(a). Finally, the decision not to open a Section 15(8) investigation does not preclude or diminish shippers' rights to judicial review. Whether the Commission determines that rates are lawful after an investigation initiated under Section 15(8)(a) or after one compelled by shippers under Section 13(1), shippers may obtain judicial review of that determination.[5]

[5] In contrast to a decision not to investigate under Section 15(8)(a), a decision not to suspend a proposed rate increase under Section 15(8)(b) has a different and more significant effect on carriers and shippers. If the Commission suspends a proposed rate increase and later finds it to have been lawful, the carriers will have lost the increased revenues they would have received from all shippers if the rate had not been suspended. If the Commission does not suspend a rate increase and later finds it to be unlawful, individual shippers may seek and obtain the "full amount of damages sustained in consequence" of such unlawful rate (49 U.S.C. 8), which need not be the same as the simple difference between the lawful rates and the rates charged. *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *ASG Industries, Inc.* v. *United States*, 548 F.2d 147 (6th Cir. 1977).

If the Commission does not suspend the rates but initiates an investigation under Section 15(8)(a), Section 15(8)(e) does create a potential, though limited, refund liability for carriers if the rates are ultimately found unlawful. In that respect, the Commission's decision not to initiate an investigation under Section 15(8)(a) has a consequence in addition to allocating burdens of proof; but as we discuss at pages 20-22, *infra*, that consequence is not relevant to the availability or timing of judicial review.

Although the burden of proof sometimes is of considerable significance to the Commission's ultimate determination of the lawfulness of rates (see, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, *supra*, 412 U.S. at 813-814 (plurality opinion) and pages 32-37, *infra*), there is no reason to suppose that Congress intended to make the Commission's allocation of burdens wholly immune from judicial review. Although an investigation under Section 15(8)(a) would require expenditures of the Commission's time and resources, a decision not to open such an investigation does not ensure any savings, since aggrieved persons can require the Commission to make those expenditures on demand under Section 13(1). And it is commonplace for courts, reviewing final agency adjudications, to review the correctness of the agency's allocation of burdens in a proceeding. See *Environmental Defense Fund, Inc.*

v. *EPA*, 548 F.2d 998, 1013-1015 (D.C. Cir. 1976) cert. denied, 431 U.S. 925 (1977) (collecting cases).

2. *Review of the Commission's Decision Not To Investigate Under Section 15(8)(a) Should Await a Final Decision By The Commission On The Lawfulness of the Rates*

Although the scheme of the Interstate Commerce Act does not suggest a congressional intent to insulate the Commission's decision not to investigate under Section 15(8)(a) entirely from judicial review, we believe that the court of appeals was incorrect in holding that decision is immediately reviewable.

The Administrative Procedure Act, 5 U.S.C. 704, provides in pertinent part that:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

This requirement that agency rulings are subject to review only after "final agency action" (unless otherwise authorized by statute) reflects the principle that "it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." *McKart* v. *United States*, 395 U.S. 185, 194 (1969). This requirement also is an aspect of the general principle that parties must exhaust their administrative remedies before

they may seek the assistance of the courts. See *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479 (1964). As this Court said in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), it is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

The finality requirement of Section 704, and the exhaustion doctrine, indicate that review of the Commission's decision not to open an investigation under Section 15(8)(a) should await the Commission's final determination of the lawfulness of rates after a proceeding that any aggrieved person can require the Commission to conduct under Section 13(1). As we have argued in the preceding section, a decision not to open an investigation does little more than allocate the burden to shippers to demonstrate unlawfulness. An agency's decision to allocate burdens in a proceeding is plainly "[a] preliminary, procedural, or intermediate" ruling that may be reviewed only after the completion of the proceeding and a final decision on the merits.

Nothing in the Interstate Commerce Act suggests a need for immediate judicial review of a decision not to proceed under Section 15(8)(a). Any aggrieved party who seeks judicial review of such a decision could as easily file a complaint under Section 13(1). In many cases, an administrative proceeding under Section 13 would be completed before a court finally

decided whether the Commission abused its discretion in failing to proceed under Section 15(8). And because aggrieved shippers may meet their burden of demonstrating the unlawfulness of the rates in a Section 13 proceeding, and thus obtain a complete remedy, immediate judicial review of the Section 15(8)(a) decision in such cases would be unnecessary and wasteful.

It may seem strange to conclude that a court should wait until after the Commission has conducted an investigation into the lawfulness of rates under Section 13(1) before deciding whether the Commission should have conducted an investigation under Section 15(8)(a). But many important issues are not resolved by courts until administrative proceedings are over. The point of judicial review is not to force the Commission to conduct an investigation (Section 13(1) already does that), but rather to ensure that the burdens in the investigation are placed in accordance with the statutory design. That question, like many other potentially dispositive issues, can best be reviewed after the proceeding is over.[6] And if the Commission's error should require an investigation to be redone, that is a small price to pay for avoiding premature judicial review, and its attendant delay, in many other cases. Trials and administrative proceedings frequently are redone; this is undesirable, but the alternative—immediate review of every important

[6] Only then will a reviewing court know whether the potentially dispositive issue in fact was dispositive.

procedural or substantive issue in the case—is still less desirable.

The following example may illustrate our position. Suppose a group of carriers files a tariff increasing rates for the shipment of alfalfa from $50 per ton to $100. Despite shipper protests, the Commission declines to conduct an investigation under Section 15(8)(a) for the stated but erroneous reason that a new statute requires it to allow unlimited rate increases on alfalfa, but that if it had some say in the matter the increase would surely warrant an investigation. The rates then go into effect; the shippers file a Section 13(1) complaint, and thus initiate a proceeding in which they and the carriers present argument and evidence supporting their positions. Fuller argument is possible in this proceeding than could be had in the brief time before the Commission made its decision under Section 15(8).[7] At the end of the proceeding the Commission enters a final decision in which it repudiates its erroneous statement about the new law but upholds the lawfulness of the in-

[7] Under Section 15(8)(a) the Commission usually has 30 days within which to decide whether to investigate the proposed rate, and it must reach its decision on the basis of whatever brief submissions the carriers or protestants may provide. That fact suggests that the Commission should be accorded a substantial margin of discretion in making such decisions (see pages 32-34, *infra*) and also indicates the wisdom of deferring judicial review until the Commission's final decision on the lawfulness of the rates. Fuller consideration under a Section 13(1) proceeding may well lead the Commission to correct any erroneous view it may have had that persuaded it not to investigate under Section 15(8).

creased rates on the ground that the shippers had not met their burden of demonstrating that the rates were above the permissible zone of reasonableness. The shippers then can obtain judicial review. If the court first concludes that the burden of proof had an effect on the outcome of the Section 13(1) investigation,[8] it should then decide whether the Commission abused its discretion in declining to initiate a Section 15(8)(a) investigation. If the court finds such abuse—and it presumably would in this example—it then should remand to the Commission with directions to institute a new proceeding in which the carriers have

[8] In many cases the inquiry would end with a finding that the burden was irrelevant. In the case before the Court, for example, the burden of proof has no effect on the analysis of the asserted long-and-short-haul violation. Such violations cannot be justified by the reasonableness of the rates charged. Moreover, even in many cases involving "reasonableness" of rates, if the evidence of unlawfulness in a given case is so powerful that it was arbitrary for the Commission, after considering these factors, not to investigate, then the same evidence should be sufficient to carry the day for the complainant in a Section 13(1) case without regard to the placement of the burden of proof.

Furthermore, the fact that in some cases it might appear to a court that the proposed rates are clearly unlawful would provide no basis for immediate judicial review of the Commission's decisions not to investigate them. Under the Administrative Procedure Act and general principles of finality applied in other contexts, non-final decisions are not reviewable no matter how apparently erroneous, since the agency or trial court might well correct its initial error in its final decision and since in any case the aggrieved party has an adequate remedy on review of the final decision. See *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978).

an opportunity to meet their burden.[9] Suppose that after such a proceeding the Commission finds that the carriers failed to meet their burden and that the rate increases were therefore unlawful. In those circumstances, a determination by the Commission that the rates are unlawful, which would entitle shippers to damages under Section 8, does no more than implement the statutory scheme by placing the burdens where the statute intended. This would give shippers a remedy but avoid premature and potentially unnecessary judicial decisionmaking.

In sum, we believe that a court reviewing a final Commission decision under Section 13(1), with the full record before it, would have jurisdiction to determine whether the initial placement of the burden on the shippers was arbitrary, capricious, or contrary to the Commission's statutory mandate, and, if so, whether that error made a difference to the outcome. If the court makes both determinations, it should remand for further proceedings in which the burdens would be properly placed. This procedure would protect the interests of shippers, carry out the statutory design, and minimize the disruption, delay and waste of judicial time that might be caused by piecemeal litigation of the Commission's decisions.

[9] See, *e.g.*, *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976); *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800 (1976).

3. *The Accounting and Refund Provisions Of Section 15(8)(e) Are Not Relevant To The Availability or Timing of Judicial Review*

The Commission's decision not to open an investigation under Section 15(8)(a) and to await any complaints under Section 13(1) has one consequence, in addition to the shifting of the burden of proof, that may be urged as a consideration relevant to the question of review. If the Commission initiates an investigation under Section 15(8)(a) without suspending the proposed rate changes, Section 15(8)(e) provides that the Commission must require the carriers to keep an account of the amounts received because of the increases (and from whom they were received) during the period of the investigation, but in no event more than seven months.[10] Section 15(8)(e) further provides that if the Commission's final order after such an investigation finds the rate increases to have been unlawful, it must require the carriers to refund to shippers that portion of the accounted—for increases that were found unlawful. If, on the other hand, the Commission does not initiate an investigation under Section 15(8)(a), and the shippers compel it to investigate and determine the lawfulness of the rates under Section 13(1), the carriers will not have kept an account, and the shippers will not be entitled to refunds under Section 8.

[10] Ten months if the Commission extends its investigation to ten months, as Section 15(8)(a) permits if the Commission files a written report to Congress explaining why it cannot reach a decision within seven months.

They would be entitled only to their damages, which may be less than refunds if the shippers have passed their increased costs through to their customers.

While this may make it significant to carriers and shippers whether the Commission proceeds under Section 15(8)(a) or under Section 13(1), the differences do not provide a basis for supposing that Congress intended either to immunize the Commission's decision not to proceed under Section 15(8)(a) entirely from judicial review or to override the usual rule against premature judicial decisions. Even if aggrieved persons could seek immediate review of a decision not to investigate under Section 15(8)(a), filing a petition in a court of appeals would have no effect on the carrier's obligation to keep accounts. The obligation could not be created until a court had reviewed the Commission's decision on the merits; during the interim no records would be kept. The obligation would expire in any event seven months after the rates went into effect, and a final judicial decision that the Commission abused its discretion in failing to initiate an investigation could not undo the past. A final judicial decision that the Commission abused its discretion might ultimately justify an order that the carriers pay refunds for that seven-month period on the basis of the best evidence available, but that result is only what the Act contemplates. And if, as we contend, the Commission's decision should be reviewed in the context of a final order determining the lawfulness of the rates, which is reviewable in any event, review would not affect

or interfere with the Commission's exercise of its functions under the Act.

The example used earlier (pages 17-19, *supra*) may again illustrate our contention. Suppose that the court, in reviewing a final order under Section 13(1) that increased rates are lawful, determines that the Commission erred in placing the burden on shippers, finds that that error was of decisional consequence, and orders the Commission to reopen its proceedings. If, in that new proceeding, the carriers fail to meet their burden, the Commission may direct that the carriers refund the excess rates for the period in which they should have been accounted for and refunded; this achieves the result the statutory scheme intended. The procedure, including judicial review, does not affect or interfere with the Commission's proper functions under the Act. And little could be gained by immediate judicial review of the decision not to open a Section 15 (8)(a) investigation.

4. *The Decisions Relied On By Petitioners Do Not Support Their Argument That The Commission's Decision Not To Investigate Under Section 15(8)(a) Is Unreviewable*

a. Petitioners rely on a number of decisions of this Court that do not, in our view, support their contention that the Commission's decision not to initiate an investigation under Section 15(8)(a) is immune from judicial review.

Arrow Transportation Co. v. *Southern Ry.*, 372 U.S. 658 (1963), held that a court had no power to

enjoin the implementation of rates before the Commission makes a determination about their lawfulness. That case does not suggest, however, that a decision not to investigate under Section 15(8)(a) is immune from review. In *Arrow* the Court concluded that Congress intended to give the Commission the exclusive authority to suspend rates pending a final decision on their lawfulness because any power in the courts to suspend rates would result in non-uniform rates, contrary to the statutory purpose, and because the exercise of such a power would require courts to make independent determinations of the reasonableness of rates, contrary to the congressional purpose to vest those determinations primarily in the Commission. 372 U.S. at 662-672. See also *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978); *United States* v. *SCRAP*, 412 U.S. 669, 691 (1973) (*SCRAP I*).[11] Judicial review of a decision

[11] In *Arrow* the Court held that a district court could not suspend rates after they had gone into effect at the expiration of a Commission-imposed suspension period but before a final determination by the Commission on their lawfulness. In *SCRAP I* this Court expanded that principle somewhat by holding that a court could not enjoin rate changes during the statutory period when the Commission has declined to suspend them. 412 U.S. at 691. In the *Trans Alaska Pipeline Rate Cases, supra*, however, this Court held that a court could review a decision to suspend rates; a court may ensure that the Commission does not exceeded its statutory authority.

After a final decision by the Commission that a proposed rate increase is lawful, courts may have the authority to enjoin an increase when necessary to effect their power to review the Commission's decision. The Court has not resolved

not to open an investigation under Section 15(8)(a) would not have the effect of suspending rates and would not require courts prematurely to assess the reasonableness of rates. The review would come after the fact.[12] It would interrupt nothing. It would raise no risk of non-uniform rates. It would not extend a statutory limit on the permissible length of suspension. Such review would simply involve the well recognized power "to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* 412 U.S. at 806 (plurality opinion).

The Commission also relies on *City of Chicago* v. *United States,* 396 U.S. 162 (1969). In that case the Commission commenced an investigation under 49 U.S.C. (1976 ed.) 13a into proposals by carriers to discontinue certain passenger services but terminated the investigation without prohibiting the discontinuance. This Court held that the order terminating the investigation was reviewable because it was, in effect, a final determination on the merits

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that question. Compare the plurality opinion in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* 412 U.S. at 819-824, with *id.* at 826-828 (Douglas J., dissenting in part).

[12] As *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* 412 U.S. at 818 (plurality opinion), explained, the power of a court to review, set aside and suspend a Commission order, which is clearly given by statute (28 U.S.C. 2342(5)), is not the same thing as "an injunction forbidding the railroads to implement a proposed change in rates * * *."

of the discontinuance, and the Court could find "no talismanic sign indicating that Congress desired to deny review to opponents of interstate discontinuances" (396 U.S. at 164). To the extent that refusing to open a Section 15(8)(a) investigation might be viewed as a decision on the merits, then, *City of Chicago* actually supports review.[13] But the Commission relies on dicta in the opinion, stating "[w]hether the Commission should make an investigation of a § 13a(1) discontinuance is of course within its discretion, a matter which is not reviewable." 396 U.S. at 165.

As dicta, that statement does not, as the Commission claims (78-597 Pet. 12), "control[] this case." See, *e.g., Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 461-462 (1978). More important, however, the structure and purpose of Section 13a is quite different from the rate review mechanisms of Sections 13(1) and 15(8). Various sections of the Act provide that it is unlawful for carriers to charge certain rates or engage in certain practices (see 49 U.S.C. (1976 ed.) 1(5), 2, 3(1), 4(1)), and Section 13(1) gives any aggrieved party the right to complain to the Commission and to compel the Commission to investigate and adjudicate the alleged unlawfulness, whether or not the Com-

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[13] We have argued above (see pages 11-12, *supra*) that the Commission's decision not to open a Section 15(8)(a) investigation does not decide any issue, let alone any entire case, on the merits. *City of Chicago* thus does not support the position of respondents.

mission has done so under Section 15(8). Neither Section 13a nor any other provision makes it unlawful for carriers to discontinue service without the Commission's approval. Discontinuance is prohibited only if the Commission, in its discretion, undertakes an investigation, concludes that continued operation is required by the public interest, and orders the carrier to continue service.[14] If the Commission does not undertake an investigation, no aggrieved person can compel the Commission to do so under Section 13(1), because discontinuance would not be unlawful.[15] Cf. *Morris* v. *Gressette, supra.* In short, Section 13a provided the Commission with discretion that it does not have with respect to the investigation of allegedly unlawful rates and practices.

The fact that Section 13(1) permits parties to compel the Commission to investigate and adjudicate allegedly unlawful rates and practices, and gives the Commission no discretion to decline to do so, also

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[14] The discontinuation and abandonment provisions were substantially changed in 1976. See Pub. L. No. 94-210, 90 Stat. 127, 49 U.S.C. (1976 ed.) 1a; see generally *Chicago & North Western Transportation Co.* v. *United States,* 582 F.2d 1043 (7th Cir. 1978), cert. denied, No. 78-411 (Dec. 4, 1978).

[15] It would have been different if a carrier had abandoned a "line of railroad" without the Commissions approval, since Section 1(18) of the Act, 49 U.S.C. (1976 ed.) 1(18), prohibited carriers from abandoning "all or any portion of a line of railroad, or the operation thereof" unless they first obtained permission from the Commission. Discontinuance of a particular service on a line was not an abandonment of a line within the meaning of Section 1(18). *Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341, 346 n.7 (1951).

distinguishes this case from the other cases relied on by petitioners. See *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (refusal of the NLRB's General Counsel to issue an unfair labor practice complaint is not reviewable); *FTC* v. *Klesner,* 280 U.S. 19, 25 (1929) (refusal of FTC to issue a complaint is not reviewable). These cases stand for the long-recognized rule that courts cannot review decisions to prosecute or not prosecute particular offenses and offenders. See *United States* v. *Nixon,* 418 U.S. 683, 693 (1974); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Confiscation Cases,* 74 U.S. (7 Wall.) 454 (1868). But investigations under the Interstate Commerce Act are as much part of a program for redress of private harms as they are part of a system of public prosecutions. Moreover, unlike the Interstate Commerce Act, the statutes of the NLRB, the FTC, and other prosecutorial agencies give aggrieved persons no right to compel the agency to investigate and adjudicate allegedly unlawful practices. Indeed in *FTC* v. *Klesner,* the Court made this very point (280 U.S. at 26; footnote omitted):

> The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the Interstate Commerce Act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter Act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person

> deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim. The Federal Trade Commission Act contains no such features.

When an agency's discretionary authority to investigate and file complaints may be analogous to the discretion of a public prosecutor there are often compelling reasons, grounded in the statutory purpose, for inferring that review is precluded even in the absence of statutes expressly precluding review of such discretionary decisions. Deciding whether particular matters warrant the expenditure of time and resources is often a difficult judgment involving considerations that "are beyond the judicial capacity to supervise." K.C. Davis, *Administrative Law Treatise* § 28.16 (1970 Supp.).[16] Moreover, judicial review of such decisions often would have seriously disruptive effects on the statutory enforcement scheme.[17] Those considerations are not present where,

[16] See also, *e.g.*, *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976).

[17] In other cases in which this Court had held that an administrator's decision, or inaction, is not subject to review, the Court has found special reasons in the statutory scheme and purpose for inferring a preclusion of review. Thus, in *Morris* v. *Gressette*, *supra*, the Court held that the Attorney General's failure to object to a new state reapportionment plan under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, was not judicially reviewable. The Court inferred a preclusion of review because review would be contrary to the very purpose of the statutory scheme, which was to provide states with an expeditious means of implementing and enforcing state legislation that would be otherwise prohibited by the "severe" and "unusual" provisions of Section 5. No analogous purpose of the Interstate Commerce Act would be undermined by limited judicial review, at the appropriate time, of the Commission's refusal to initiate an investigation under Section 15(8)(a). Review of the Attorney General's failure to object under Section 5 of the Voting Rights Act would be more analogous to review of the Commission's refusal to suspend rates, since the ultimate effect of review in each case would be to prevent the affected party (the state or the carrier) to implement practices that ultimately might be found to be lawful.

as here, the agency has no discretion to decline to investigate and adjudicate a private complaint, and where the principal effect of the agency's refusal to conduct the investigation on its own initiative is to shift the burden of proof in a later investigation and adjudication that it must undertake.

Instead, the statutory scheme of the Interstate Commerce Act is more analogous to the statute considered in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). In that case the Court held that the decision of the Secretary of Labor not to bring an action to set aside a union election under 29 U.S.C. 482 is subject to some kind of judicial review. (The Court did not decide what the scope of review might be or what remedies, if any, a court could employ.) That statute, like Section 13(1), gives aggrieved private persons a right to file a complaint with the Secretary and requires the Secretary to investigate the complaint. It also requires the Secretary to bring an action to set aside the election if he finds the com-

plaint supported by probable cause. Although the Court did not reach the question whether a court could order the Secretary to file a complaint (421 U.S. at 575), it stated (421 U.S. at 567 n.7): "We agree with the Court of Appeals, for the reasons stated in its opinion, 502 F.2d 79, 86-88 (CA3 1974), that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion." The reasons stated by the court of appeals in *Bachowski* are similar to those we have discussed above: the grounds for declining to review prosecutorial decisions are not present when the statutory scheme demonstrates substantial concern with the adjudication and vindication of private rights. Indeed, we submit that the Commission's decision not to investigate under Section 15(8) is more clearly reviewable than the Secretary's decision not to file a complaint under 29 U.S.C. 482, because, when a complaint is filed under Section 13(1), the Commission has no choice but to act on it; it must both investigate and adjudicate the merits of the complaint. 29 U.S.C. 482(b), in contrast, gives the Secretary of Labor discretion in deciding whether to act on a complaint by filing an action to set aside the election.

b. Petitioners also rely on *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977), which held that orders of the Commission declining to investigate proposed rate increases in a general revenue proceeding are not reviewable. The court reasoned that 49 U.S.C. (1970 ed.) 15(7),

which was then applicable to all common carriers, committed the power to investigate and the power to suspend to the Commission in the same terms, and that they should therefore be equally immune from review. 567 F.2d at 1000-1003.

For the reasons previously stated, we believe that *Asphalt Roofing* was wrongly decided. Investigation and suspension are very different indeed (see pages 10-13, 22-24, *supra*). General revenue increases, however, pose an issue that is not presented by tariffs (such as the one in this case) that simply increase rates on specific commodities.

If the Commission declines to investigate a tariff pertaining to specific commodities, shippers have a remedy in Section 13(1), which generally has been viewed as the appropriate procedure for deciding whether particular rates for particular commodities and particular routes are lawful. See *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 311-316 (1975) (*SCRAP II*). An investigation of a proposed general revenue increase, however, does not address the lawfulness of the increase as it pertains to particular commodities or routes; it focuses instead on the total revenue needs of carriers. Accordingly, shippers may not seek judicial review of decisions upholding general revenue increases on the ground that the increase is unlawful as it pertains to particular commodities or routes; shippers must present such claims under Section 13(1). *SCRAP II*, *supra*.

Although some courts have held the contrary, the United States and the Commission have contended that orders approving general revenue increases may be reviewed with respect to the issue they have finally decided—*i.e.*, whether the carriers' general revenue needs warrant the general increase. This Court has reserved decision on that question. See *SCRAP II*, *supra*, 422 U.S. at 317 n.18 (citing cases). Cases in which the Commission declines to investigate proposed general revenue increases would present the question whether shippers can use a Section 13 investigation to present the general revenue issue for adjudication; if not, the Commission's failure to investigate should be immediately reviewable. See 5 U.S.C. 704. In our view nothing in Section 13 precludes a complainant from challenging not only the lawfulness of the increased rates as they pertain to particular commodities and routes but also the general revenue justification for the increase. The decision not to investigate would thus be reviewable only after a final decision on those matters. This case, however, does not involve a general revenue increase and does not present these questions.

C. The Commission's Discretion Under Section 15(8)(a) Is Broad But Not Unlimited, And Judicial Review Is Necessary To Protect Statutory Policies

The practical effect of our position may not differ significantly from the position of the Commission and the other petitioners. If review is available, as we

contend, courts would examine the Commission's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). We agree with the Commission that the scope of its discretion under Section 15(8)(a) is broad. Carriers file hundreds of tariffs with the Commission each year, and in deciding which of those to investigate under Section 15(8)(a) the Commission must have discretion to consider many factors, including the probable unlawfulness of the proposed rate, the rate's likely effect on the public, the Commission's limited resources, and its regulatory priorities. Its judgment on those matters is entitled to considerable deference and should be upheld if it is "rational and based on consideration of the relevant factors." *FCC* v. *National Citizens Committee For Broadcasting*, 436 U.S. 775, 803 (1978). The Commission need not investigate under Section 15(8)(a) just because a complainant can make a showing of probable unlawfulness.

Acknowledging that the Commission's discretion is broad, however, is quite different from asserting that it is unbounded, as petitioners contend. And the fact that judicial review may be necessary to protect statutory rights in only a few cases is not a reason for concluding that review is not available at all.

Moreover, while it would not be possible to identify the universe of reasons that might support the Com-

mission's discretion in particular cases,[18] cases certainly can be imagined in which the Commission's decision not to proceed under Section 15(8)(a) would be an abuse of discretion or contrary to its statutory mandate. For example, we think that a court could set aside a decision not to proceed under Section 15(8)(a) if the decision rested entirely on incorrect legal grounds, such as lack of jurisdiction; or on the ground that the protesting shippers were members of the wrong political party; or on the ground that a proposal to triple rates for basic commodities would not have a sufficient effect on the public to warrant an expenditure of the Commission's resources.[19]

[18] Each case would depend on the particular facts, and factors relied on by the Commission that might be rational in one context might be irrational in another. We express no view on whether a court reviewing a final decision on the lawfulness of the rates in this case could properly conclude that the Commission abused its discretion in not initiating an investigation under Section 15(8)(a). For the reasons we have stated, any conclusion on that issue would be premature. Indeed, as we argue at note 8, *supra*, it may never be necessary for a court to decide that issue in this case.

[19] It is far more likely that the Commission would be found to have abused its discretion for having made legal or jurisdictional errors than for its assessment of facts, and it seems most unlikely that the Commission would base any decision on blatantly discriminatory grounds. But judicial review for abuse of discretion is not limited to a review of the agency's legal conclusions. A prosecutor's decision not to investigate or prosecute, on the other hand—to which petitioners analogize the Commission's discretion—may not be judicially reviewed whether it is based on errors of law, fact, or outright corruption. Correction of such abuses is left to the political process and (in the case of corruption or civil rights offenses) to criminal prosecution of the prosecutors. Cf. *Imbler* v. *Pachtman, supra.*

Cases also can be imagined in which the burden shifting effect of such decisions may be of decisive consequence. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* although involving a somewhat different factual situation, is a pertinent illustration. In that case carriers filed a tariff proposing to charge shippers separately for a service that was formerly provided as part of the general line haul rate to all shippers desiring the service. The carriers did not propose to reduce the line haul rate correspondingly, although prior decisions had established a policy against permitting carriers to institute new service charges unless they also demonstrated that the line haul rate remaining in effect also would be just and reasonable. The Commission investigated the tariff and found it to be just and reasonable, although the carriers had not demonstrated that the line haul rate that would remain in effect would be just and reasonable.

This Court reversed the Commission on the ground that it had not adequately explained its departure from its prior policy. Significantly, for purposes of this case, the Court concluded that a principal consequence of the Commission's departure from its prior policy would be to shift to shippers the burden to prove the unlawfulness of the line haul rates.[20] The plurality opinion stated (412 U.S. at 814):

[20] The Court remanded the case to the Commission for a further justification of its departure from prior policy but reversed the district court's injunction against the carrier's implementation of the new charges. Mr. Justice Douglas con-

> [T]he change involved in making the shippers claim that particular rates are unreasonable [*i.e.*, carry the burden of going forward] is not all that is at stake. For in proceedings for reparations, there is also a change in the burden of proof: the shipper must produce substantial evidence that the rate is unreasonable. This would appear to affect the likelihood that the shipper will prevail. There is a zone in which rates are reasonable, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 (1935), and it would seem to be harder to establish that the proposed rates fell outside that zone than that they fell within it. Or so Congress believed, for it specified the allocation of the burden of proof in suspension proceedings as part of the cost to the carriers; in return for confining the power to suspend rates to the Commission, and so of eliminating the threat of long-drawn-out injunctive proceedings in the courts, Congress made the carriers carry a burden of proof that would otherwise not have been theirs.

In short, the Court expressly recognized the practical significance of decisions by the Commission that effectively shift burdens of proof, and it at least implicitly

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curred with the plurality opinion's view that the Commission had not adequately explained its departure from prior policy but dissented with respect to the reversal of the injunction. 412 U.S. at 826-828. The dissenting Justices believed that the Commission had adequately justified its decision but did not disagree with the plurality's view that the principal effect of the decision was to shift the burden to shippers. 412 U.S. at 828-836.

recognized that such decisions are subject to judicial review.[21]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1979

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[21] Although the Court in that case was reviewing a final decision that a proposed tariff for ancillary services was lawful, the Commission's method of proceeding also can be regarded as a decision not to investigate an aspect of the proposed change (the continuation of the previous line haul rates) that the Commission previously had viewed as inseparable from charges for ancillary services. Analytically, therefore, the case is very similar to cases where the Commission declines to investigate a tariff under Section 15(8)(a).

APPENDIX A

49 U.S.C. (1976 ed.) 13(1) provides:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 U.S.C. (1976 ed.) 15(8) provides in pertinent part:

> (a) Whenever a schedule is filed with the Commission by a common carrier by railroad

stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond

the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

* * * * *

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision

(a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse affect (in violation of section 2 or 3 of this title) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other

matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

5 U.S.C. 701(a) provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. 702 provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. * * * *

5 U.S.C. 704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

APPENDIX B

Pertinent Sections of the Interstate Commerce Act as set forth in 49 U.S.C. (1976 ed.) and as referred to in this brief	Corresponding Sections of the Interstate Commerce Act as recodified by Pub. L. No. 95-473, 92 Stat. 1337 (1978)
49 U.S.C. (1976 ed.)	49 U.S.C. (Supp. 1976)
1(5)	10701(a)
1(18)	10901
2	10741(a)
3(1)	10741(b)
4(1)	10726
6(3)	10762(c)(3)
8	11705(b)(2)
9	11705(c)(1)
13(1)	11701(b)
13a	10908
14(1)	10310
15(8)	10707

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